Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

DEC 4 1980

MICHAEL RODAK JR., CLE

IN THE

Supreme Court of the United States

October Term, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*,
Petitioners (79-1711),

vs.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner (79-1754),

vs.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760),

vs.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners (80-12),

vs.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals
for the Third Circuit

Petitions for Certiorari Filed April 29, 1980 (79-1711);
May 5, 1980 (79-1754); May 5, 1980 (79-1760); July 3, 1980 (80-12)
Certiorari Granted October 20, 1980

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The opinion of the Court of Appeals for the Third Circuit, filed February 5, 1980, is reported at 616 F.2d 1222 (App. A, p. 1a *et seq.*).* The opinion of the United States District Court for the District of New Jersey, filed August 14, 1978, is unreported (App. C, p. 5a *et seq.*).

JURISDICTION

Jurisdiction of this Court is pursuant to 28 U.S.C. §1254(1). Jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. §1291.

The grounds of jurisdiction of the District Court invoked by plaintiffs, to the extent that they were sustained by the Court of Appeals in reversing the dismissal of the action by the District Court, are based upon the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1251, *et seq.* (FWPCA), the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. §1401 *et seq.*) (MPRSA), 28 U.S.C. §1331(a) and 28 U.S.C. §1331.

STATUTES INVOLVED

The statutory provisions involved are the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1251, *et seq.* (FWPCA), and the Marine Protection, Research and Sanctuaries Act of 1972, as amended (MPRSA), (33 U.S.C. §1401 *et seq.*).

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* References to appendix, except where otherwise indicated, are to the Appendix to the Petition for Certiorari of Petitioner Environmental Protection Agency.

The test of the statutory provisions involved is set forth in pages 1 through 6 of the Petition for Certiorari of Petitioner Environmental Protection Agency.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) §§1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) §§1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts.

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

STATEMENT OF THE CASE

Respondent National Sea Clammers Association is an association whose members earn their living harvesting fish and shellfish in the Atlantic Ocean off the coast of New York and New Jersey. Respondent Gosta Lovgren is an individual member of the association. On January 14, 1977, these two respondents brought suit, on behalf of themselves and purportedly on behalf of all others similarly

situated, against all petitioners, in the United States District Court for the District of New Jersey.

The Complaint alleges that the petitioning sewerage authorities, as well as the City of New York, other municipalities in the area, and various federal agencies and officers, discharge effluent and dump dredge spoil, sludge, and other toxic materials into the Atlantic Ocean and its tributaries. Some of these discharges and dumping activities are alleged to be authorized by permits issued by petitioner Army Corps of Engineers to the petitioning sewerage authorities in the course of the administration of various federal pollution control statutes. The Complaint further alleges that the dumped and discharged materials caused a massive growth of algae in 1976 in an area extending up to twenty miles offshore from Long Island, New York to Cape May, New Jersey. When this algae mass bloomed and died it allegedly settled and decomposed on the ocean floor, the decomposition allegedly creating an oxygen deficiency that caused severe damage to marine life in the area. The Complaint states further that the dumped and discharged materials "have caused and continue to cause massive destruction of marine plant life, fish, clams, lobsters and other marine life unable to escape and thereby, has caused and continues to cause the collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean." Complaint ¶39. Joint Appendix p. 26a.

The Complaint alleges violations of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 *et seq.*, the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. §1401 *et seq.*, the federal common law of nuisance, and other statutes and constitutional provisions not relevant to the present review. The relief sought includes the imposition of fines and penalties against

the dumpers and dischargers to be paid in part to the respondents, a declaration that petitioners have failed to comply with the requirements of the FWPCA and MPRSA, mandamus to compel the federal petitioners to revoke all permits allowing the allegedly harmful activities, and an injunction prohibiting further dumping of "sewage, sludge or other pollutants off the coast of the Continental United States. . . ." In addition, the Complaint seeks a quarter billion dollars in actual damages and a quarter billion dollars in punitive damages to be "assessed against defendants jointly and severally." Complaint ¶¶94-109. Joint Appendix p. 41a-45a.

Petitioners and most of the other defendants moved to dismiss the claims under *Fed. R. Civ. P.* 12(b). The district court treated the motion as a motion for summary judgment and ordered the complaint dismissed with prejudice, with the exception of certain pendant State law claims which were dismissed without prejudice (App. D, p. 60a-61a).

The court dismissed the claims under the FWPCA and the MPRSA because the respondents did not comply with the sixty (60) day prelitigation notice requirements of the citizen suit provisions of those Acts, 33 U.S.C. §1365(a) and 33 U.S.C. §1415(g)(5). Also rejected was the argument that implied rights of action jurisdictionally based on 28 U.S.C. §1331 and not subject to the specific requirements of the citizen suit provisions exist under the FWPCA and MPRSA (App. C, p. 43a-50a).

Claims based upon the federal common law of nuisance were dismissed, the court holding that private parties have no standing to bring such claims (App. C, p. 40a-41a). All other claims were dismissed. None, however, is a subject of the present review.

The Court of Appeals reversed in part, reinstating the claims under the FWPCA, the MPRSA and the federal

common law of nuisance, ruling that private parties can maintain an action under the federal common law of nuisance (App. A, p. 20a-24a).

With respect to the claim under the FWPCA, the court of appeals agreed that the respondents had not met the requirements of the citizen suit provision of that statute. However, the court held that respondents had an alternate basis for suit under 33 U.S.C. §1365(e), invoking jurisdiction under 28 U.S.C. §1331. Section 505(e) is a "savings clause", reciting that the citizen suit provision does not "restrict any right . . . under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." Applying the analysis of *Cort v. Ash*, 422 U.S. 66 (1975), the court of appeals found that a private right of action should be implied under the FWPCA on behalf of individuals injured by pollution in violation of those statutes (App. A, p. 11a-16a). This implied right of action, the court concluded, was "preserved" by the savings clause and therefore the plaintiffs could maintain their claims alleging violations of the FWPCA without reference to the restrictions imposed by the citizen suit provision.

The court of appeals then examined the similar citizen suit provision of the MPRSA and ruled that it was indistinguishable from that of the FWPCA for these purposes. Accordingly, it held that the savings clause of the MPRSA, 33 U.S.C. §1415(g)(5), also preserved an implied private right of action under that statute separate from the citizen suits authorized by 33 U.S.C. §1415(g) (App. A, p. 16a-18a).

Petitions were made to this court for a Writ of Certiorari, and on October 20, 1980 the petitions were granted, limited to the questions set forth in the questions presented for review, *supra*. Joint Appendix p. 48a.

SUMMARY OF ARGUMENT

I. The Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act of 1972 do not imply a private right of action independent of the rights explicitly created by those citizens suit provisions of those acts.

Petitioners Passaic Valley Sewerage Commissioners and the Linden Roselle Sewerage Authority adopt as argument for the above-stated proposition those arguments set forth by Petitioner Environmental Protection Agency *et al.*

II. A private citizen has no standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), this Court extended to States the right to maintain an action for pollution of interstate waters under the federal common law of nuisance. Subsequent lower court decisions have extended such right of action to the United States. The majority of lower court decisions rendered subsequent to *Illinois v. City of Milwaukee* that have addressed the issue of whether or not a private party may maintain such an action have resolved the question in the negative.

The rationale of recognizing a right of action by States in *Illinois v. City of Milwaukee* is based upon the protection of the States' sovereign interests in pollution free waters as against persons or political entities outside of the State. Bereft of such a rationale in the instant case, the court below justified its extension of the federal common

law nuisance action to private parties on the "need for a uniform rule of decision" rationale mentioned in footnote 6 of *Illinois v. City of Milwaukee,* speculating that the Plaintiffs would otherwise be subject to possibly conflicting New York and New Jersey nuisance standards. The court below failed, however, to hold whether or not there were in fact any such conflicting standards, or comment upon the manner, if any, in which such hypothetically conflicting standards could work to the prejudice of the Plaintiffs.

There is a clear rationale for not extending standing to a private party to bring a cause of action under the federal common law of nuisance. At that point in history where Congress had not as yet acted with respect to nuisances or obstructions of navigable waters, this Court denied a right of action under federal common law. Congress has now acted, but has expressly set forth in its legislative purposes the policy to recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution.

Yet another reason for not extending the right of action under federal common law to private parties is that to do so would place parties such as the present petitioners in impossible operating circumstances, forcing them to carry out their statutory duties to their citizens, comply with a multitude of federal and state regulations, and then to attempt to comply with unwritten and potentially unpredictable federal common law standards.

III. Any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if previously available to a private citizen, has been preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

Subsequent to the decision of *Illinois v. City of Milwaukee,* the Federal Water Pollution Control Act has been amended with an attendant increase in scope and effect of the administrative regulations adopted by petitioner Environmental Protection Agency. Every point source capable of discharging pollutants into a navigable body of water must now be approved by the Environmental Protection Agency, which has the power and duty to impose stringent limitations on the content of their discharges and the manner in which they must be treated. Discharge of a pollutant without such approval is unlawful. The amendments also create a timetable for the complete elimination of water pollution.

Also, subsequent to the decision in *Illinois v. City of Milwaukee,* Congress has enacted the Marine Protection, Research and Sanctuaries Act, which prohibits the dumping of any material into ocean waters except as authorized by permit. Where a State desires to extend dumping regulations or criteria beyond those set forth in the Act, it must do so through the Federal Government.

Where Congress has acted not only to express a federal interest but to establish a formula for definition and enforcement of such interests, this Court has held federal common law to be preempted and replaced. See *e.g., Arizona v. California,* 373 U.S. 546 (1963). With respect to the Acts in question, Congress has now taken over the

problems of point discharging of treated effluent and the ocean dumping of sludge as well as the evaluation and protection of interests affected thereby. The statutes set forth mechanisms for defining standards to be followed and enforcement provisions for failure to follow such standards. Appropriations have been made to government agencies to carry out fully the mandates of the legislation. Clearly, in the light of such activity, the legislation has preempted any pre-existing federal common law.

ARGUMENT

I. The Federal Water Pollution Control Act, 33 U.S.C. (& Supp. I) §§1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. (& Supp. I) §§1401 *et seq.*, do not imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts.

Petitioners Passaic Valley Sewerage Commissioners and the Linden Roselle Sewerage Authority adopt as argument for the above stated proposition those arguments set forth by Petitioner Environmental Protection Agency *et al.*

II. A private citizen has no standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), this Court held that pollution of interstate or navigable waters creates an action arising under the laws of the United States within the meaning of 28 U.S.C. §1331(a) that may be asserted by a State. Citing *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971), the Court limited the issue to only whether a State could maintian such an action, for as was stated:

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having

basis and standard in federal common law and so directly constituting a question arising under the laws of the United States. 406 U.S. at 99-100.

Several lower court cases decided subsequent to *Illinois v. City of Milwaukee, supra,* recognized the availability of the federal common law remedy of nuisance to the United States. See, *e.g., United States v. Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145 (D. Vt. 1972), 363 F. Supp. 110 (D. Vt. 1973), *aff'd* 487 F.2d 1393 (2d Cir. 1973), *cert. den.* 417 U.S. 976 (1976); *United States v. United States Steel Corp.,* 356 F. Supp. 556 (N.D. Ill. 1973); *United States v. Stoeco Homes, Inc.,* 489 F.2d 597 (3d Cir. 1974), *cert. den.* 420 U.S. 927 (1975).

Presented for review by this Court is now the question as to whether or not such a cause of action based on the federal common law is available to private parties.

The majority of the lower court decisions rendered subsequent to *Illinois v. City of Milwaukee, supra,* that have addressed the issue have held that federal common law nuisance actions cannot be maintained by private plaintiffs. See *Parsell v. Shell Oil Co.,* 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd mem. sub nom. East End Yacht Club, Inc. v. Shell Oil Co.,* 573 F.2d 1289 (2d Cir. 1977); *Committee for Consideration of Jones Falls Sewerage System v. Train,* 375 F. Supp. 1148, 1153-1154 (D. Md. 1974), *aff'd on different but not inconsistent grounds,* 539 F.2d 1006 (4th Cir. 1976); *cf. City of Evansville, Indiana v. Kentucky Liquid Recycling Corp.,* 604 F.2d 1008 (7th Cir. 1979); *Township of Long Beach v. City of New York,* 445 F. Supp. 1203 (D.N.J. 1978); *Highland Park v. Train,* 519 F.2d 681 (7th Cir. 1975), *cert. den.* 424 U.S. 927 (1976). The only cases known to petitioner wherein standing to sue has been extended to private individuals are *Byram River v. Village of Port Chester,* 394 F. Supp.

618 (S.D.N.Y. 1975), and the Third Circuit decision in the case at bar.

The controversy at the lower court level has arisen in part from the text of footnote 6 of *Illinois v. City of Milwaukee,* 406 U.S. at 105, to wit:

> Thus, it is not only the character of the parties that requires us to apply federal law. . . . [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. . . .

The Third Circuit in the case at bar cited the text of the aforesaid footnote as support for extending the federal common law nuisance action to private parties. App. A, p. 21a-24a. A contrary reading of the footnote was undertaken by the District Court opinion in *Committee for Consideration of Jones Falls Sewerage System v. Train, supra:*

> * * * 'it is not only the character of the parties that requires us to apply federal law.' This statement can be read in at least two different ways. It could mean (a) that there were other considerations sufficient in themselves to require application of federal law, or (b) that there were other federal interests which in addition to the character of the parties required the application of the federal law although those interests in themselves would not have been sufficient. In the view this Court takes of the basis for the Supreme Court's decision, the latter interpretation is the proper one. 375 F. Supp. at 1154, 1155 n.12.

The rationale of recognizing a right of action by States as announced in *Illinois v. City of Milwaukee* appears to

be that of protecting the State's sovereign interests in pollution free waters as against persons or political subdivisions outside of the State. Virtually all of the pollution cases relied upon in *Illinois v. City of Milwaukee* involved claims by a sovereign that its sovereign interests were being infringed by activities of persons in another State. For example, this Court quoted extensively from *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), where the rationale for development of a federal common law of nuisance entailed provision of a forum to peacefully adjudicate disputes between States as a necessary corollary to the federal system:

> * * * When the states by their union made the forceable abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. 206 U.S. at 237.

Likewise, in framing its ruling, the Court in *Illinois v. City of Milwaukee* defined the interests to be protected by the federal common law cause of action as "the ecological rights of a State in the improper impairment of them from sources outside the State's own territory . . . ." 406 U.S. at 100.

Bereft of such a rationale in the instant case, the Third Circuit has justified its extension of the federal common law nuisance action to private parties on the "need for a uniform rule of decision" rationale in footnote 6 of *Illinois v. City of Milwaukee*. Specifically, the Third Circuit held that "relegating these litigants to possibly conflicting New York and New Jersey nuisance standards would ignore the clear

intent of the Supreme Court to federalize those standards and would undermine that federal uniformity." App. A, p. 21a-22a. The problem is that the Third Circuit does not identify the "possibly conflicting New York and New Jersey nuisance standards," nor does the decision provide support for an inference that any such standards conflict. Moreover, even if any such standards were in conflict, the Third Circuit has not opined that such a conflict would necessarily work a prejudice to the respondent plaintiffs.

The only other water pollution case wherein a Court allowed a cause of action alleging violation of the federal common law to be maintained by a private party is *Byram River v. Village of Port Chester, supra.* In that case, the Court did not discuss the issue as to whether or not a private party had standing to bring a federal common law nuisance action, and it would appear that no party raised the issue in the course of proceedings dealing with motions to dismiss. The Court there cited *Illinios v. City of Milwaukee* for the proposition that subject matter jurisdiction existed under 28 U.S.C. §1331 to consider a claim of nuisance upon interstate waters in violation of federal common law, and said nothing further. Thus, that case also provides no indication of a rationale for extending the right of action to a private party.

It is respectfully submitted that there is a clear rationale for not extending standing to a private party to bring a cause of action under the federal common law of nuisance. Federal common law is applied where the Congress or the constitution manifests a federal interest. See Friendly, "In Praise of Erie—and the New Federal Common Law." 39 N.Y.U. L. Rev. 383 (1964). At that point in history where Congress had not acted with respect to nuisances or obstructions of navigable waters, this Court denied a right of action under federal common law. *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888).

Congress has now acted, but in a fashion which suggests that whatever has not been legislated to be the responsibility of the federal government is reserved to the States. Thus, in §1251(b) of the FWPCA, Congress stated:

> It is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution . . . .

Certainly, the savings clauses of FWPCA, 33 U.S.C. §1365(e) and MPRSA, 33 U.S.C. §1415(g)(5), preserve any right which any person may have "under any statute or common law to seek enforcement of any effluent standard or to seek any other relief . . . ." Nothing in the aforesaid saving language requires the conclusion that the stated common law is other than the common law of the States.

To recognize a right of action of federal common law nuisance to be the States' as was done in *Illinois v. City of Milwaukee, supra* is not inconsistent with the stated legislative policy. To extend such a right to individuals, however, would be beyond the stated policy and in derogation of States' rights to identify and weigh the benefits and adverse effects of allegedly polluting activities not otherwise within the purview of the federal scheme, in the light of the interests of the States and their citizens.

Yet another reason for not extending the right of action under federal common law to private parties is that to do so would place parties such as the undersigned petitioners in impossible operating circumstances. Petitioner Passaic Valley Sewerage Commissioners, for example, must treat and remove sewage generated by 1,300,000 people, 350 industries, 2,200 commercial enterprises, and 29 municipalities, and at the same time comply with extremely

stringent and prolific federal and state regulations. It would be oppressive to engraft upon these tasks the additional burdens of meeting unwritten standards of the federal common law of nuisance as they may arise and be enforced at the behest of private parties. The *Illinois v. City of Milwaukee* recognition of the availability of the federal common law nuisance action to States does not create a problem for Petitioners, since they always will be required to deal with the express standards of these States. To the extent that Petitioners discharge into a body of water commonly bordering on New York and New Jersey, compliance with the federal standards set forth in the various applicable legislative acts and regulations provides an anticipatory solution to the possibility of conflicting State standards. However, to be required to attempt to plan based upon unannounced standards would adversely affect activities such as facilities planning, financing and operations.

Finally, as will be noted in greater detail in Argument III *infra,* there is simply no need to extend the federal common law of nuisance action to private parties given the existing statutory standards and enforcement mechanisms.

For these reasons, Petitioners urge this Court to rule that a private citizen does not have standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

III. Any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if previously available to a private citizen, has been preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act.

In *Illinois v. City of Milwaukee*, this Court forecast this issue:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. 406 U.S. at 107.

Subsequent to the decision of *Illinois v. City of Milwaukee*, the Federal Water Pollution Control Act was amended, see Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. §1251 *et seq.*, with an attendant increase in scope and effect of the administrative regulations adopted by Petitioner Environmental Protection Agency. Every point source capable of discharging pollutants into a navigable body of water now must be approved by the Environmental Protection Agency, which has the power and duty to impose stringent limitations on the content of their discharges and the manner in which they must be treated. *E.P.A. v. State Water Resources Control Board*, 462 U.S. 200 (1976). Discharge of a pollutant without such approval is unlawful. 33 U.S.C. §1311(a). The amendments also create a timetable for the complete elimination of water pollution, *i.e.*, that "it is the national goal that the discharge of pollutants

into the navigable waters be eliminated by 1985." 33 U.S.C. §1251(a)(1).

To the extent that effluent limitations imposed under the FWPCA are less than what may be desired by individual states, the Act provides that such states may establish more stringent limitations. 33 U.S.C. §1370; *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). This, of course, is consistent with the statutorily stated policy of Congress to preserve in the states primary responsibility for preventing, reducing and eliminating pollution from point discharges, 33 U.S.C. §1251(b).

It is submitted, therefore, that under FWPCA, Congress has legislated into federal control those discharges which are appropriate for uniform federal regulation. Limitations outside the federal regulation are not left to be filled by the development of a federal common law but rather are preserved to the states. In such a case, there is no reason for the existence of a federal common law and all considerations otherwise the subject of the federal common law should be deemed to have been preempted.

Also subsequent to the decision in *Illinois*, Congress enacted MPRSA, 33 U.S.C. §§1401-1444, also known as the Ocean Dumping Act. MPRSA prohibits the dumping of *any* material into ocean waters except as authorized by permit. 33 U.S.C. §1411.

Implementation of MPRSA requires a determination as to all materials other than dredged materials, that their dumping will not unreasonably degrade or endanger human health, welfare or amenities or the marine environment, ecological systems, or economic potentialities. 33 U.S.C. §1412. The dumping of dredged materials is regulated by the Secretary of the Army pursuant to 33 U.S.C. §1413.

Thus, *every* act of dumping of material of *any type* is subject to federal review in the context of weighing societal benefit and detriment. In this context, it is respectfully submitted that there are no statutory interstices which might otherwise form the basis for development of a body of federal common law and as such any federal common law regarding ocean dumping has been preempted. Further, where a state desires to extend dumping regulations or criteria, it must do so through the federal government. 33 U.S.C. §1416(d).

Where Congress has acted not only to express a federal interest but to establish a formula for definition and enforcement of such interests, this Court has held federal common law to be preempted and replaced. See, *e.g.*, *Arizona v. California*, 373 U.S. 546 (1963) wherein, with respect to allocation of water from the Colorado River between the States of California and Arizona, this Court stated:

> It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress has not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own nations of an 'equitable apportionment' for the apportionment chosen by Congress. . . . 373 U.S. at 565.

With respect to both FWPCA and the MPRSA, Congress has taken control over the problems of point discharging of treated effluent and the ocean dumping of

sludge as well as the evaluation and protection of interests affected thereby. The statutes set forth mechanisms for defining standards to be followed and enforcement provisions for failure to follow such standards. Appropriations have been made to government agencies to carry out fully the mandates of the legislation. Clearly, in the light of such activity, the legislation has preempted any pre-existing federal common law.

Petitioners are aware that this Court has granted *certiorari* to review the recent Circuit Court decision in *Illinois v. City of Milwaukee*, 599 F.2d 151 (8th Cir. 1979), *cert. granted*, — U.S. —, 48 U.S.L.W. 3902 (March 18, 1980), to consider the question of whether the present FWPCA, as now amended, preempts the federal common law of nuisance as it applies to point source discharges. In this regard Petitioners join in the argument of Petitioners in the *Illinois* case, it being submitted that the rationale of preemption by FWPCA is no different as to ocean discharges than it is as to discharges into interstate bodies of water.

CONCLUSION

For the above-stated reasons, Petitioners respectfully urge this Court to reverse and vacate the judgment of the United States Court of Appeals for the Third Circuit, and to instruct that the case be remanded to the United States District Court for the District of New Jersey for dismissal of respondent's claims under the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, and Federal Common Law of Nuisance.

Respectfully submitted,

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